IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-6899

ROBERT FRANKLIN GODFREY,

Petitioner,

v.

THE STATE OF GEORGIA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

BRIEF FOR PETITIONER

J. CALLOWAY HOLMES, JR.
Stewart and Holmes
P.O. Box 63
Cedartown, Georga 30125
404/748-2330

GERRY E. HOLMES
Mundy and Gammage
P.O. Box 930
Cedartown, Georgia 30125

Counsel for Petitioner

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

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CITATION TO OPINION BELOW

The opinion of the Supreme Court of Georgia is reported in Godfrey V. The State, 243 Georgia 302 (1979), and is set out in the Appendix at P 99.

JURISDICTION

The judgment of the Supreme Court of the State of Georgia was final on March 27, 1979 and is set out in Appendix A hereto. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3), petitioner having asserted below and asserting here deprivation of rights secured by the Constitution of the United States.

The petition for certiorari was filed on June 25, 1979 and granted on October 9, 1979.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States, and the privileges and immunities clause therein.

2. This case also involves the following provisions of the Code of Georgia:

Ga. Code Ann. Section 26-1101

"*Murder* (a) A person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being. Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears, and where all the circumstances of the killing show an abandoned and malignant heart.

(b) A person also commits the crime of murder when in the commission of a felony he causes the death of another human being, irrespective of malice.

(c) A person convicted of murder shall be punished by death or by imprisonment for life."

Ga. Code Ann. Section 26-3102

"*Capital offenses; jury verdict and sentence.* Where, upon a trial by jury, a person is convicted of an offense which may be punishable by death, a sentence of death shall not be imposed unless the jury verdict includes a finding of at least one statutory aggravating circumstance and a recommendation that such sentence be imposed. Where a statutory aggravating circumstance is found and a recommendation of death is made, the court shall sentence the defendant to death. Where a sentence of death is not recommended by the jury, the court shall sentence the defendant to imprisonment as provided by law. Unless the jury trying the case makes a finding of at least one statutory aggravating circumstance and recommends the death sentence in its verdict, the court shall not sentence the defendant to death, provided that no such finding of statutory aggravating circumstance shall be necessary in offenses of treason or aircraft hijacking. The provisions of this section shall not affect a sentence when the case is tried without a jury or when the judge accepts a plea of guilty."

Ga. Code Ann. Section 27-2534.1

"*Mitigating and aggravating circumstances; death penalty.*

(a) The death penalty may be imposed for the offenses of aircraft hijacking or treason, in any case.

(b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to

the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:

(1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions.

(2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.

(3) The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.

(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.

(5) The murder of a judicial officer, former judicial officer, district attorney or solicitor or former district attorney or solicitor during or because of the exercise of his official duty.

(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.

(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that involved torture, depravity of mind, or aggravated battery to the victim.

(8) The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.

(9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement.

(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.

(c) The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict be a recommendation of death, shall designate in writing signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In non-jury cases the judge shall make such designation. Except in cases of treason or aircraft hijacking, unless at least one of the (statutory) aggravating circumstances enumerated in Code Section 27-2534.1(b) is so found, the death penalty shall not be imposed."

Ga. Code Ann. Section 27-2537

"*Review of death sentences.* (a) Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Supreme Court of Georgia. The clerk of the trial court, within ten

days after receiving the transcript, shall transmit the entire record and transcript to the Supreme Court of Georgia together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and suppled by the Supreme Court of Georgia.

(b) The Supreme Court of Georgia shall consider the punishment as well as any errors enumerated by way of appeal.

(c) With regard to the sentence, the court shall determine:

(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and

(2) Whether, in cases other than treason or aircraft hijacking, the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in Code Section 27-2534.1(b), and

(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

(d) Both the defendant and the State shall have the right to submit briefs within the time provided by the court, and to present oral argument to the court.

(e) The Court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

(1) Affirm the sentence of death; or

(2) Set the sentence aside and remand the case for resentencing by the trial judge based on the record and argument of counsel. The records of those similar cases referred to by the Supreme Court of Georgia in its decision, and the extracts prepared as hereinafter provided for, shall be provided to the resentencing judge for his consideration.

(f) There shall be an Assistant to the Supreme Court, who shall be an attorney appointed by the Chief Justice of Georgia and who shall serve at the pleasure of the Court. The Court shall accumulate the records of all capital felony cases in which sentence was imposed after January 1, 1970, or such earlier date as the court may deem appropriate. The Assistant shall provide the court with whatever extracted information it desires with respect thereto, including but not limited to a synopsis or brief of the facts in the record concerning the crime and the defendant.

(g) The court shall be authorized to employ an appropriate staff and such methods to compile such data as are deemed by the Chief Justice to be appropriate and relevant to the statutory questions concerning the validity of the sentence.

(h) The office of the Assistant shall be attached to the office of the Clerk of the Supreme Court of Georgia for administrative purposes.

(i) The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence."

Georgia Laws, 1973, p. 162, Act No. 74

"At the conclusion of all felony cases heard by a jury, and after argument of counsel and proper charge from the court, the jury shall retire to consider a verdict of guilty or not guilty without an consideration of punishment. In non-jury felony cases, the judge shall likewise first consider a finding or guilty or not guilty without any consideration of punishment. Where the jury or judge returns a verdict or finding of guilty, the court shall resume the trial and conduct a pre-sentence hearing before the jury or judge at which time the only issue shall be the determination of punishment to be imposed. In such hearing, subject to the laws of evidence, the jury or judge shall hear additional evidence in extenuation, mitigation, and aggravation of punishment, including the record of a prior criminal convictions and pleas of guilty or pleas of nolo contendere of the defendant, or the absence of any such prior criminal convictions and pleas; provided, however, that only such evidence in aggravation as the State has made known to the defendant prior to his trial shall be admissible. The jury or judge shall also hear argument by the defendant or his counsel and the prosecuting attorney, as provided by law, regarding the punishment to be imposed. The prosecuting attorney shall open and the defendant shall conclude the argument to the jury or judge. Upon the conclusion of the evidence and arguments, the judge shall give the jury appropriate instructions and the jury shall retire to determine the punishment to be imposed. In cases in which the death penalty may be imposed by a jury or judge sitting without a jury, the additional procedure provided in Code Section 27-2534.1 shall be followed. The jury, or the judge in cases tried by a judge, shall fix a sentence within the limits prescribed by law.

The judge shall imposed the sentence fixed by the jury or judge, as provided by law. If the jury cannot, within a reasonable time, agree to the punishment, the judge shall impose sentence within the limits of the law, provided, however, that the judge shall in no instance impose the death penalty when, in cases tried by a jury, the jury cannot agree upon the punishment. If the trial court is reversed on appeal because of error only in the pre-sentence hearing, the new trial which may be ordered shall apply only to the issue of punishment."

Georgia Laws, 1973, p. 171, Act No. 74

"Any person who has been indicted for an offense punishable by death may enter a plea of guilty at any time after his indictment, and the judge of the superior court having jurisdiction may, in his discretion, during term time or vacation, sentence such person to life imprisonment, or to any punishment authorized by law for the offense named in the indictment. Provided, however, that the judge of the superior court must find one of the statutory aggravating circumstances provided in Code Section 27-2534.1 before imposing the death penalty except in cases of treason or aircraft hijacking."

QUESTION PRESENTED

In affirming the imposition of the death sentence in this case, has the Supreme Court Court adopted such a broad and vague construction of Georgia Code Annotated Section 27-2534.1(b)(7) (specifying certain aggravating circumstances) as to violate the Eighth and Fourteenth Amendments to the United States Constitution?

STATEMENT OF THE CASE

Robert Franklin Godfrey, the defendant named above as petitioner, was indicted for the murders of his wife and mother-in-law and the aggravated assault upon his young daughter by the Polk County Grand Jury on December 15, 1977, wherein it was alleged these offenses were committed by him on September 20, 1977.

The petitioner had a previous history of confinement at the Central State Mental Hospital in Milledgevilie, Georgia. He had been at Central State in 1950, 1966, and 1970, and once at the Veteran's Administration facility in Murfreesboro, Tennessee. (Tr. 364, App. 48) These confinements were due to a drinking problem, connected with depression and violent episodes toward his wife. (Tr. 439, App. 57, 58) The petitioner endured these confinements voluntarily so that his wife would take him back, and he and his wife were always reconciled after the petitioner was confined for short periods of time, the most being two months. (Tr. 364, App. 48) The Defendant had also undergone brief treatment by a psychiatrist, Dr. William S. Davis, in the mid-sixties in Rome, Georgia, when Dr. Davis practiced there before moving to Atlanta.

The defendant had been employed for approximately 25 years, with two short breaks, at the Northwest Regional Hospital in Rome, Georgia. In the earlier years, the defendant was a surgical nurse and in recent years his duties involved post-operative care and routine duties upon the wards. He was described by the head nurse and supervisor, Mrs. Jean Lebkicher, (Tr. 293, 294, App. 27, 28) and the chief surgeon, Dr. Joseph

Liang (Tr. 299, 300, App. 29), who testified to his good reliable honest character based upon working with him for over 20 years, as believable, very good and reliable at his work, and particularly gentle with patients and especially children. The defendant had been a combat medic in World War Two and Korea. (Tr. 424) The defendant suffers from extreme hypertension and is a diabetic who can not tolerate insulin. (Tr. 368, App. 50, 51) In 1976, the petitioner ran as Chief Deputy Sheriff with the losing candidate in the Sheriff's race in Polk County.

On September 5, 1977, the defendant got into an allegedly violent argument with his wife and pulled a knife on her. (Tr. 366, App. 48, 49) His wife then left him and stayed with relatives for a short time thereafter moving in with her mother. Her mother lived in a trailer approximately 200 yards downhill from the defendant's house. The trailer was situated next to a nephew's trailer and in the backyard of a house on the main road where the defendant's married daughter lived. The defendant's house was at the end of a long driveway going in near the house and trailers and winding up through some trees onto a fill. During the separation, the defendant talked with his wife on three occasions briefly but she would not agree to move back home. (Tr. 367, App. 49, 50)

Then Mrs. Godfrey had divorce papers served upon the petitioner in which she asked the Court to award all the property and their minor daughter to her. Mr. Godfrey did not consult with a lawyer. The hearing upon the divorce was set for September 22, 1977. Throughout the separation, Mr. Godfrey was very anxious to reconcile with his wife as had always

occurred in the past. (Tr. 374, 375, App. 53)

On September 20, 1977, the petitioner went to work as usual and performed his normal duties throughout the day at the hospital in a normal manner. He was called sometime during the day by his mother-in-law and told that his wife wanted to talk with him by telephone that evening. This led the defendant to hope that their differences would be resolved. The petitioner got home around 4:00 o'clock, P.M., and fixed himself something to eat. Mrs. Godfrey called him around 5:00 to 5:30 o'clock, P.M., they argued, and she would not agree to reconcile with the petitioner and stated that she wanted all the property as well. Mrs. Godfrey hung up after saying she would call back later. The petitioner testified that he was extremely depressed by this. (Tr. 373, 375, App. 53)

Mrs. Godfrey called back later, approximately 7:30 o'clock, P.M., according to petitioner's testimony, but he was not sure about the time. (Tr. 376, 378, App. 54, 55, also 40, 41) This second conversation, according to the petitioner, was more heated and Mrs. Godfrey ended the call with a final rejection of petitioner's attempt to save the marriage and by again telling the defendant that she wanted all the property and would see him in court. Upon hanging up the telephone the defendant testified that he has never in his life experienced such a low feeling, as if kicked in the stomach, and then he blacked out and has no further memory of the subsequent events until the following day when he waked up in the Polk County Jail. (Tr. 379, App. 55)

The evidence, through various witnesses, established that the petitioner, at some time shortly after the

second telephone call, got his single shot 20 guage shotgun and walked down the hill to his mother-in-law's trailer where Mrs. Godfrey, Mrs. Wilkerson, the mother-in-law, and petitioner's 12 year old daughter were seated around a table playing cards. The petitioner then shot his wife through the window in the forehead killing her instantly and proceeded into the trailer and hit his daughter on the head with the gun as she ran out towards the married daughter's house. The petitioner then shot his mother-in-law in the head with one shotgun blast killing her instantly. Petitioner then called the Polk County Sheriff's office and told the dispatcher, after identifying himself, to tell the Sheriff that he had just blown his wife's and mother-in-law's heads off and to come and get him. (Tr. 198)

The petitioner then went outside into the yard and placed the shotgun in the branches of an apple tree. Then he went toward his married daughter's house near the road and sat down in a chair under a shade tree to wait for the police. When the police arrived he told him "they're dead, it's all over with", and showed one officer where the gun was placed in the tree. He was described by all of the officers as very calm looking, steady on his feet, with no odor of intoxicants on his breath, and it was all of the officers' opinion that he was definitely not intoxicated. (Tr. 276) Concerning his mental state at the time of the shootings, it is significant to note that all of his previous history of violence was associated with very heavy intoxication, whereas, on this occasion, he had not had anything to drink, (Tr. 364, App. 52, 53) and had not been drinking for some time prior to the killings in an attempt to help reconcile his marriage. (Tr. 181-189;

App. 19) Later at the Polk County Police station, according to one officer with whom he was left alone momentarily, and who neither made a tape recording nor written statement, nor asked the amazingly loquacious defendant to repeat it in company, the petitioner allegedly told this particular officer that he had done a "heinous" crime, had thought about it for a long time, and would do it again. (Tr. 239, App. 26)

At the trial, the defense marshalled testimony relative to the petitioner's mental state at the time of the shootings. Dr. William S. Davis, a highly qualified psychiatrist who is on the clinical teaching staff at Emory Medical School and is Past President of the Georgia Psychiatrists Association, testified that in his opinion the second telephone conversation with his wife, created such an emotional trauma and provocation that it caused the petitioner to go into a altered state of consciousness described by Dr. Davis as a dissociative reaction, as evidenced by the blackout of memory and the petitioner's previous history of blackouts. Dr. Davis further testified that in this state the petitioner's conscious will could not control his subconscious impulses and resulting acts. Dr. Davis had seen and treated the defendant in the mid-sixties in Rome when Dr. Davis was with the Harbin Clinic and had also seen him on two occasions, pursuant to court order in the month prior to the trial of the case.

The second visit to Dr. Davis' office at Peachtree Parkwood Mental Hospital, where he is Chief of Staff, was specifically for a sodium amytal (popularly known as truth serum) interview to determine, among other things, the petitioner's truthfulness concerning the loss of memory and the emotional trauma he felt at the

recognition that he would not, finally, be able to once again save his marriage. Significant portions from the transcript of Dr. Davis' testimony are set out as follows:

> "Q. Doctor, based on his relation of this history to you and your previous knowledge of him, were you able to upon your examination to form any kind of opinion to what the state of his mind was at that time—on the 20th after the last telephone call?
>
> A. Yes, I decided that on the 20th after the telephone call that he had a . . . what is known as a dissociative state, a dissociative attack, and that this attack lasted from the time he first realized that she was not coming back home until he woke up the next day in jail and came back to his senses at that point in time. (TR-313, APP-35) . . .
>
> A. Yes sir, a dissociative state, I guess a dissociative state is the most common psychiatric condition which is known to be one of the most common non-psychotic psychiatric conditions which is responsible for some alteration in consciousness. In a dissociative state a person can just actually cut off from his mine oh, stimuli such as say bodily sensations may not come through to awareness. He may cut off from his mind awareness of what is going on around him, he may cut off from his mind memory, all of these things can cut from mind when in a state of dissociation. And in such a state a person may be able to carry out thoughts, feelings, impulses, which he could not release were he in his

normal state of conscious awareness. I guess you might say in that condition a person might be acting sort of automatically, that his will, if you will, his will was absent or greatly reduced may be example . . . (TR-314, 315; APP-35, 36) . . .

Q. (Hypothetical questions stated) . . . The question is, assuming those facts are true, is that consistent with the type mental state that you have described to us, or unusual?

A. Yes, it is. A person in a state of dissociation can carry on a conversation and unless someone is familiar with dissociative states and happens to think about it, they could appear to be, you know, reasonably normal or almost completely normal. One thing about that whole scene that really struck me as further, at least in my mind, evidence that he was in a dissociative state was his very normalcy, if you will. The fact that he showed no emotional upset, that he was not torn up after having done such a thing as he did, the fact that he was very calm, very quiet about the whole thing, that in of its self to me is abnormal. The fact that he appeared so normal in such conditions is to me abnormal and says to me that there was something, you know, going on haywire inside his head. Whereas, the feeling was split off from the action that he had actually done, it had been dissociated. (TR-317, 318, APP-37, 38) . . .

Q. I am speaking of after the telephone call (the second phone call) with his wife. In your opinion was the defendant's mind or reasoning power to any extent impaired thereafter?

A. Okay, yes, I think that it was and it must have been because at that point in time he was . . . remembers being . . . he remembers being overwhelmed with a feeling of dispair. He remembers . . . well, he said he was like being kicked in the stomach, he said that he never . . . he had wrestled and he had fought but he had never been hurt when he finally realized that it was over. There was no chance for reconciliation, and then he says to me that everything just sort of faded away, went black, and I think at that point his conscious . . . the over . . . the emotion I started to say overwhelming emotion, I think the emotion of the final finality of her rejection really did overwhelm him and he went into this state of dissociation.

Q. Do you have an opinion as to whether or not his acts immediately thereafter that evening would be the product of his will?

A. I think that these are acts that he could not have done had he been at himself consciously. I think had he been in his usual state of conscious awareness this act was at the time so abhorrent to him that he could not have done it.

Q. While someone is in this state of dissociation, can they exercise control over their . . . does their will, conscious will, have the ability to exercise control over their automatic actions?

A. Not the same . . . no. Not to the same degree. Not to any thing like the same degree as would occur when he was normally aware and alert.

Q. When a person is in this type of state do

you have an opinion whether or not they are able to distinguish between right and wrong and to be able to consciously control their actions relative to that?

A. I think they might know the difference between right and wrong but their ability to control powerful emotional forces acting on them is markedly reduced and I think in such a state a person might very well not be able to exercise control to such a degree that he could prevent himself from doing something which he knew was wrong." (TR-330-324, APP-40, 41).

Dr. Davis testified that the petitioner could not remember the crimes even after receiving an injection of sodium amytal, although the drug did not affect him as much as most people, perhaps because of his history of heavy drinking.

Several laymen opined for the State that they thought Godfrey was sane; however, his daughter testified that apparently, Mrs. Godfrey did not. (TR-181-189, APP-14).

The State's experts from Milladgeville, the State Mental Hospital, agreed with the description of the dissociative state as described by Dr. Davis, but, of course, felt that the defendant did not experience one. The State's psychiatrist and psychologist, as well as Dr. Davis, agree however that this dissociative state is not a psychotic condition. The State's experts were a young psychologist with ten months experience and the other, a psychiatrist who had been at Milledgeville for a good many years and who did not remember very much about the interview with the petitioner while he was at Milledgeville under court order for examination a month before the trial of the case.

On March 9, 1978, the jury brought back guilty verdicts on all counts of the indictment and upon the sentencing stage, fixed the punishment at death and designated as the aggravating circumstance or circumstances: "That the offense of murder was outrageously or wantonly vile, horrible, and inhuman." Even though the statutory aggravating circumstance reads as follows: "That the offense of murder was outrageously or wantonly vile, horrible, or inhuman *in that it* involved torture, depravity of mind, or aggravated battery to the victim." (Emphasis supplied by counsel) The District Attorney, in addressing the jury on the sentencing phase, had announced that torture was not involved, and aggravated battery was not involved. (TR-570, 571; APP-75, 76)

On Monday, March 13, 1978, the Court sentenced the defendant to death by electrocution and set the date at April 14, 1978 at 11:00 o'clock, A.M., and gave the petitioner ten years to serve on the aggravated assault conviction. A Motion for New Trial was timely made and after a few months waiting for the record to be prepared, the Motion was overruled and a Notice of Appeal was timely filed to the Georgia Supreme Court. Petitioner's Brief was filed in said Court October 22, 1978, and the case was argued November 20, 1978. The convictions and sentences were upheld by the Court, with two dissenting Justices, on February 27, 1979, and the Rehearing was denied on March 27, 1979.

HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

The entire Georgia Death Penalty Statutory Scheme was attacked in a pretrial Motion to Dismiss which was overruled by the Trial Court and pursued as Enumeration of Error Number 19 in the appeal to the Georgia Supreme Court. In the brief before the Georgia Supreme Court, petitioner argued that Section B7 was unconstitutionally vague and that the partial finding of the statutory aggravating circumstance rendered the death sentence void on constitutional grounds but the Georgia Supreme Court rejected all of these arguments and approved the phraseology used by the jury.

ARGUMENT

The question presented by the Court in this case for consideration is as follows: In affirming the imposition of the death sentence in this case, has the Georgia Supreme Court adopted such a broad and vague construction of Georgia Code Annotated Section 27-2534.1(b)(7) as to violate the 8th and 14th Amendments to the United States Constitution?

Counsel submit most emphatically that it has. The Georgia Supreme Court, in affirming the death sentence in this case, based upon a partial, incomplete and uncertain finding of the seventh aggravating circumstance, has construed such section so broadly as to violate the 8th and 14th Amendments. It has also rendered Section (b)(7) unconstitutionally vague as construed in this case. And furthermore, it has allowed

an unconstitutionally overbroad application of Section (b)(7) in this case.

(A)

Counsel submit that Section B7, as construed by the Georgia Supreme Court, is unconstitutionally vague under the 8th and 14th Amendments.

The Georgia Supreme Court affirmed the death sentence in this case upon the partial finding of the Seventh aggravating circumstance, i.e., "the offense of murder was outrageously and wantonly vile, horrible and inhuman", holding, in rather off-handed fashion that the "jury's phraseology was not objectionable." This seems particularly routine where such an important and sensitive question is involved. One can only guess that the Georgia Supreme Court assumed that the holding in *Gregg v. Georgia* forever insulated the Georgia Death Penalty Statute, including Section B7, from constitutional attack. This manifestly is not the case:

> "The Petitioner attacks the Seventh Statutory Aggravating Circumstance, which authorizes imposition of the death penalty if murder 'outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravating battery to the victim', contending that it is so broad that capital punishment could be imposed in any murder case. *It is, of course, arguable that any murder involves depravity of mind or an aggravated battery. But this language need not be construed in this way, and there is no reason to assume that the Supreme Court of Georgia will*

adopt such an open-ended construction. In only one case has it upheld a jury's decision to sentence a defendant to death when the only statutory aggravating circumstance found was that of the seventh, see *McCorquodale v. State,* 233 Georgia 369, 211 S.E.2d 577 (1974), and that homicide was a horrifying torture murder." *Gregg v. Georgia,* 428 U.S. 153, 96 S.C. 2909, at 2938 (1976) (Emphasis supplied)

Thus, this Court's approval of Section B7 as facially valid, was extremely tentative, particularly in light of the fact that this Court was construing it only to the extent required to consider the capital sentencing system as a whole, and in a case where Section B7 was charged but was not even found, even though it was a double murder for the purpose of robbery. See *Gregg v. Georgia,* 96 S.C. 2909, at Page 2938, N. 51.

Whereas, prior to the decision in *Godfrey,* it appeared that the Supreme Court of Georgia did not regard the first part, or general descriptive language, as severable from the second or more specific, illustrating part so long as there was some combination of the language from each part. However, just one month prior to the Georgia Court's decision in *Godfrey,* the Court upheld a finding of Section B7 by a jury in a death sentence case as follows:

"*by evidence presented to us, we the jurors conclude that this act was both horrible and inhuman.* We conclude that Bonnie B. Bullock, an 11 year old defenseless child, was taken by force and arms and was ruthlessly executed on July 26, 1976. This constituted a finding of two of the statutory aggravating circumstances (Code Annotated Section 27-2534.1(B)(2)(7) and it is supported by the evidence." *Ruffin v. State,* 243

Georgia 95, at Pages 106-107. (Emphasis supplied)

Clearly, this construction of Section B7, along with *Godfrey,* is tantamount to holding that Section B7 is composed only of the adjective, general phrase, that is, that the offense is "vile, horrible or inhuman". Because the language in Section B7 is stated in the disjunctive, it makes it possible that death sentences may be upheld upon a jury finding that the offense was "outrageously vile" or that "this act was horrible." (See Ruffin, supra. See also *Smith v. Goguen,* 415 U.S. 582, 94 S.C. 1242 at Page 1252, N. 31) (1974). Under this authoritative construction of Section B7, Georgia Trial Judges may change, and prosecutors argue to the jury that they only need to find that the offense was "horrible" or "vile", standing alone, to impose a sentence of death; as was argued by District Attorney in this case. (Appendix P. 76)

The question becomes then, whether such terms, taken individually or in combination, can objectively guide and channel jury discretion in the imposition of a death sentence in compliance with the command of the 8th and 14th Amendments as declared in *Furman* and affirmed in *Gregg, Woodson and Lockett*? It seems clear beyond reasonable question that they cannot, and that such a construction of Section B7 is unconstitutionally vague under the 8th and 14th Amendments.

This clearly takes one into unchartable terrain where a subjective adjective such as "horrible" is supposed to provide guidance to a jury determining whether to impose the unique and most extreme penalty of death. See *Woodson v. North Carolina,* 96 S.C. at 2990-2991. See also *Grayned v. City of Rockford,* 92 S.C. 2294 (1972) at Pages 2301-2302 relying on *Coates v. Cincin-*

nati, 402 U.S. 611, 91 S.C. 16 at 86, 29 L.Ed.2d 214 (1971). These are clearly words that permit of a highly subjective, personal interpretation and are not objective enough to meet constitutional objections as to vagueness, particularly where there are no further guidelines or narrowing definitions or directions provided in the Standard Georgia Sentencing Charge approved by the Georgia Supreme Court. (See Sentencing Charge, Appendix P. 79) One only has to look to various cultures of the world to see that there is substantial disagreement amongst human beings as to what is "horrible" or "inhuman" or "vile"; a practice in one culture may be perfectly acceptable there and viewed as horrible, inhuman or vile in another culture. Counsel submit that the same is most probably true of randomly selected individuals within a particular community.

Because of their subjective nature, such words are incapable of being found beyond a reasonable doubt to be a fact. The existence of torture or aggravated battery in a particular case can be objectively found as fact. But how does one find, or prove, beyond a reasonable doubt that a murder is vile, or is horrible, or is inhuman; or, perhaps more appropriately, how can one find that the taking of another human life is not each and all of those things? How can the three adjectives taken together be more definite or objective than each separately? How can the piling of three vague, subjective terms upon one another cure the defect? Clearly, it can make no difference.

For example, can the word "inhuman" have more meaning in the context of sentencing to death than it does in ordinary usage? Although human history contains much evidence to the contrary, in our democratic

Republic, where the dignity, uniqueness and integrity of the individual and the sacredness of life are primary values, it is simply an undeniable truism that "to take the life of another human being is inhuman."

Clearly, then, the terms "murder" and "inhuman" are co-extensive; to find murder present one naturally finds that it is inhuman. But one finds "inhuman" used frequently in ordinary usage outside of the context of murder, i.e., "cruel and inhuman treatment" in divorce law or any number of common, extralegal usages. Thus, the term cannot properly be used as an objective standard to guide untrained jurors in finding some special circumstance existing in a case beyond the fact of murder; and to find so as a matter of fact beyond a reasonable doubt in order to justify the sentence of death.

Clearly the same analysis applies to the term "vile". The word "horrible" is vastly elastic, construable differently in different contexts and thus, cannot be infused with more specificity just because used in the context of a capital crime; in any case, counsel would hate to have the endless task of collecting all those things classed as "horrible" by any random sampling of little old ladies in Cedartown, Georgia.

The terms are therefore impermissably vague because their enforcement or application depends upon a completely subjective standard. See *Grayned v. City of Rockford*, supra, at Page 2302. By this construction of Section B7, the Georgia Supreme Court does not narrow the meaning of the language as to the Supreme Court of Florida did when it ruled that the phrase "especially heinous, atrocious or cruel" means "conscienceless or pitiless crime which is *unnecessarily*

torturous to the victim." State v. Dixon, 283 So.2nd 1, 9 (1973). See *Proffitt v. Florida,* 96 S.C. 2960 at 2967-2968, and *Gregg v. Georgia,* 96 S.C. at Page 2938, N. 52. Clearly, the Supreme Court of Georgia has adopted the condemned, open-ended construction that this Honorable Court was not willing to assume in *Gregg v. Georgia* that it would. *Gregg v. Georgia,* supra, Page 2938.

If the death penalty can be upheld in Georgia upon a find that the offense of murder is "vile" etc., it seems clear that there would be no qualitative difference between that and imposition of the death penalty on the finding that the offense showed "depravity of mind." Indeed, the logic of the Georgia Court's construction of Section B7 would seem to compel such a result. The term "depravity of mind" is also clearly a highly subjective standard, difficult to understand by laymen. This is strikingly demonstrated in the recent Georgia case of *Johnny Lee Gates v. State,* Supreme Court of Georgia, Number 35053, decided October 24, 1979. Pages 611 and 612 of the transcript of that trial are attached hereto as addendum A, Pages 1 and 2. After the jury had been out for approximately 47 minutes during the sentencing phase they returned to the Court and requested that the Court define "depravity of mind to the victim", which is the erroneous way the phrase had been presented by the District Attorney and charged by the Judge. The Judge, anticipating their question, had Black's Law Dictionary and a couple of regular dictionaries and, after reading the definition of a "depraved mind" from Black's and the definition of "depraved" from the other two dictionaries, the Trial Judge said as follows:

> "That's what the legal dictionary says that depraved and depravity is. And so, my interpretation—and I hope it is correct—that his actions were so vile, horrible or inhuman *that he created such a state of mind in the victim as defined by the word depravity.* That is the very best I can do for you, ladies and gentlemen, I wish I could do better." (Emphasis supplied)

This utterly confused construction of that portion of Section B7 would be laughable if it did not involve such an important matter. If a Superior Court Judge can construe the phrase in this manner, what can reasonably be expected of the laymen who elected him? How can a jury be expected to apply such a subjective standard other than in an arbitrary and capricious manner contrary to this Court's holding in *Furman v. Georgia*? Strangely enough, the Georgia Supreme Court has addressed itself to this question in the case of *Holton v. State,* 243 Georgia 312, at Page 318, decided at the same time as *Godfrey*:

> "The jury fixed the punishment on both counts of murder as death 'by reason of depravity of mind'. This is only a part of a statutory aggravating circumstance. It omits all reference to the words 'outrangeously or wantonly vile, horrible or inhuman.' See Code Annotated Section 27-2534.1(B)(7). See also *Ruffin v. State,* 243 Georgia 95 (1979); *Godfrey v. State,* 243 Georgia 302 (1979). It is unlikely that a statutory aggravating circumstance which consisted solely that the murder involved depravity of mind would survive a constitutional challenge based on *Furman v. Georgia,* 408 U.S. 238 (92 SC 2726, 33 L.Ed.2d 346) (1972); i.e., such an aggravating circumstance could be so broad as to allow the death penalty to

be imposed at random in any murder case. See *Gregg v. Georgia,* 428 U.S. 153 (96 S.C. 2909, 49 L.Ed.2d 859) (197.). Here, however, although the jury was polled, the Defendant did not object to the form of the verdict at the time of its return. Because there is to be a re-sentencing trial (See below), this problem should not rise again."

Quite obviously, counsel submit, Section B7 of the Georgia Death Penalty Statute, as construed in this case by the Georgia Supreme Court, cannot pass constitutional muster. It fails to adequately channel and focus capital sentencing discretion, and therefore, violates the 8th and 14th Amendments as construed in *Furman v. Georgia,* 408 U.S. 238 (1972), and *Gregg v. Georgia,* 428 U.S. 153, 195, N. 46 (1976) (Plurality opinion).

The basic requisite of a constitutionally valid capital sentencing procedure is that it provides "objective standards to guide, regularize, and make rationally reviewable the process for imposing a sentence of death." *Woodson v. North Carolina,* 428 U.S. 280, 303 (1976) (Plurality Opinion). Sentencing discretion in death cases must be "circumscribed by the legislative guidelines," Gregg v. Georgia, 428 U.S. 153, 207 (1976) (Plurality Opinion), which have been demanded by *Furman v. Georgia,* supra, and subsequent cases as an indispensable command of the 8th and 14th Amendments. See, e.g., *Lockett v. Ohio,* 438 U.S. 586, 601 (1978) (Plurality Opinion). "*Furman* mandates that where discretion is afforded a sentencing body on a matter so grave as the determination whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Gregg v. Georgia,* supra, 428 U.S. at 189 (Plurality Opinion). As

Gregg warns, a statutory capital sentencing system "could have standards so vague that they would fail adequately to channel the sentencing decision patterns of juries with the result that a pattern of arbitrary and capricious sentencing like that found unconstitutional in *Furman* could occur." i.d. at 195 N. 46. Section B7 of the Georgia Death Penalty Statute, as construed in *Godfrey v. State,* 243 Georgia 302, 310 (1979), has become precisely that kind of vague standard, (if it has not been so all along, as counsel submit), and therefore, offends the 8th and 14th Amendments to the United States Constitution.

Section B7 is also void for vagueness under the traditional due process standards of the 14th Amendment. For due process forbids the imposition of sanctions (See *Giaccio v. Pennsylvania,* 382 U.S. 399 (1966) under any procedure that "licenses the jury to create its own standard in each case," *Herndon v. Lowry,* 301 U.S. 242, 263 (1937), and is "susceptible of sweeping and improper application," *NAACP v. Button,* 371 U.S. 415, 433 (1963). See also *Thornhill v. Alabama,* 310 U.S. 88, 97-98 (1940). "Moreover it requires legislatures to set reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent 'arbitrary and discriminatory enforcement'." *Smith v. Goguen,* 415 U.S. 566, 572-573, 94 S.C. 1242, 1247 (1974). "If arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissably delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned v. City of*

Rockford, 408 U.S. 104, 109-110, 33 L.Ed.2d 222, 92 S.C. 2294, 2299 (1972); *Papachristou v. City of Jacksonville,* 405 U.S. 156, 162, 92 S.C. 839, 843, 31 L.Ed.2d 110 (1972); *Coates v. Cincinnati,* 402 U.S. 611, 614, 91 S.C. 1686, 1688, 29 L.Ed.ed 214 (1971). See other cases cited in *Grayned,* 92 S.C. at 2299 N. 4.

Section B7, as construed by the Georgia Supreme Court, permits the imposition of the penalty of death upon a finding of general language "of such a standardless sweep" that it allows "juries to pursue their personal predilections. Legislatures may not so abdicate their responsibilities for setting the standards of the criminal law." *Smith v. Goguen,* 94 S.C. at 1248 (1974). The fate of the petitioner in this case turned upon the application to his case by twelve persons of a statutory phrase of complete subjectivity. Other defendants might be spared while Godfrey is condemned solely because one or two persons on the jury may differ in their personal subjective interpretation of what "horrible" or "vile", or "inhuman" means and how it applies to the facts of the particular case. "This absence of any ascertainable standards for inclusion and exclusion is precisely what offends the Due Process Clause. The deficiency is particularly objectionable in view of the unfettered latitude there accorded . . . triers of fact. Until it is corrected either by Amendment or Judicial Construction, it affects all who are prosecuted under the statutory language" (*Smith v. Goguen,* 92 S.C. 1249-1250) and convicted of murder under the present laws of Georgia. Since the phrase "vile, horrible or inhuman" either used together, or singularly in the disjunctive, provides no "meaningful basis for distinguishing the . . . cases in which a death sentence . . . is

imposed from . . . the many cases in which it is not," *Lockett v. Ohio,* supra, 438 U.S. at 601 (Plurality Opinion), the Petitioner's death sentence is unconstitutionally arbitrary and cannot stand.

Counsel submit that the methodology of the void for vagueness doctrine is applicable to death penalty cases through the 8th and 14th Amendments. "The Constitution requires no more than that trials be fairly conducted and *that guaranteed rights of Defendants be scrupulously protected."* *McGautha v. California,* 402 U.S. 183, at 221, 91 S.C. 1454 at 1474. Cited in *Lockett v. Ohio,* 98 S.C. 2954 at 2975 (Rehnquist, J., dissenting). This case was decided pre-*Furman,* when no significant constitutional difference between the death penalty and lesser punishments for crime had been expressly recognized by this Court. Thereafter, *Furman,* and cases since, identified a "guaranteed right" which must be "scrupulously protected"; that is, that a citizen has a right not to be subjected to the wholly capricious and arbitrary application of the extreme, and unique penalty of death. The protection of this right requires, among other things, that the discretion of jurors, in deciding between life and death, be guided and channeled by objective standards and guidelines. *Woodson v. North Carolina,* 428 U.S. 280, 303 (1976) (Plurality Opinion). "It is now clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." *Gardner v. Florida,* 97 S.C. 1197, 1204 (1977). See also *Green v. Georgia,* 99 S.C. 2150, 2151 (1979); *Lockett v. Ohio,* 438 U.S. 586, 604-605, 98 S.C. 2954, 2964-2965 (1978) (Plurality Opinion); id., at 613-616, 98 S.C. at 2969-2970 (Opinion of Blackmun J.) For reference see *Hurtado v.*

California, 110 U.S. 516 (1884) (Harlan, J. dissenting), and *Adamson v. California,* 332 U.S. 46, 78-79 (1947) (Black, J. dissenting). In light of this doctrine, one is led, inexorably, to the conclusion that Section B7, as construed in *Godfrey,* is void for vagueness because it subjected him to the most extreme penalty under a standard so indefinite and subjective that the jurors were free to react to nothing more than their own predilections for application of the disjunctive, general language of Section B7 to his case. See *Smith v. Goguen,* 94 S.C. at 1250 (1974). It is simply intolerable under the Rule of Law Ideal, that such a judgment, arrived at by such a method, be Constitutional.

(B)

Firstly, counsel submit that the upholding of this death sentence on the jury's partial finding of the seventh aggravating circumstance constitutes, by way of analogy to the standards in civil law proceedings, an unconstitutionally overbroad construction of said Section.

Under the Georgia Death Penalty Statutory Scheme, the jury must find at least one "aggravating circumstance" beyond a reasonable doubt during the sentencing portion of the trial before a valid death sentence can be imposed. Counsel submit that the Statute itself, and earlier constructions of it, reasonably require that a whole or complete aggravating circumstance is intended. The seventh aggravating circumstance, which was the only one submitted to the jury in this case, is that the offense be:

> "Outrageously or wantonly vile, horrible or inhuman in that it involves torture, depravity of mind, or an aggravated battery to the victim" GSA Section 27-2534.1(b)(7). (Hereinafter referred to as Section B7)

In this case, the jury found beyond a reasonable doubt, on both counts of murder, that the death sentence should be imposed because:

> "The offense was outrageously and wantonly vile, horrible and inhuman." (Appendix, P. 80, 81)

Petitioner argued in his appeal to the Georgia Supreme Court, and in a supplemental brief after oral argument in that Court, that this partial finding was not a sufficient finding in contemplation of the law to support a judgment of death, in addition to attacking Section B7 as unconstitutionally vague. The Supreme Court of Georgia dismissed this argument in cavalier fashion as follows:

> "The evidence supports the jury's finding of statutory aggravating circumstances, and the jury's phraseology is not objectionable." (Appendix, P. 106)

The Georgia Supreme Court had previously indicated that it did not regard the general adjective phrase of Section B7 (vile, horrible or inhuman) as severable from the second or illustrating phrase (which shows somewhat more specificity, except for "depravity of mind") which begins with "in that it involves". In *Harris v. The State,* 237 Georgia 718 at Page 733, in an opinion decided in September, 1976, three months after *Gregg v. Georgia,* was decided, the Georgia Court upheld Section B7 against unconstitutional challenge as to vagueness, and said in part as follows:

"We believe that each of these cases establishes beyond any reasonable doubt a depravity of mind and either involves torture or an aggravated battery to the victim *as illustrating the* crimes were outrageously or wantonly vile, horrible or inhuman." (Emphasis supplied)

In another case, the Defendant contended that, because the terms in Section B7 are stated in the disjunctive and are dissimiliar, Section B7 is not capable of unanimity without polling the jury to determine which parts of it each of the jurors found beyond a reasonable doubt. The Georgia Supreme Court, in upholding the death sentence in the case, held as follows:

"We find no significant dissimilarity between outrageously vile, wantonly vile, horrible or inhuman. Considering torture and aggravated battery on the one hand as substantially similar treatment of the victim and depravity of mind on the other hand as relating to the Defendant, we find no room for non-unanimous verdicts for the reason that there is no probibition upon measuring cause on the one hand, by effect on the other hand. That is to say, the depravity of mind contemplated by the Statute is that which results in torture or aggravated battery to the victim. Thus, that aggravating circumstance specified in Code Annotated Section 27-2534.1(b)(7) is not incapable of unanimity." *Blake v. State*, 239 Georgia 292, (1977).

The Court in *Harris v. The State*, supra, Page 732, also analyzed the wording of Section B7, as follows:

"This aggravating circumstance involves both the effect on the victim, viz. torture, or an aggravated battery; and the offender, viz., depravity of mind. As to both parties the test is that the acts (the

offense) were outrageously or wantonly vile, horrible or inhuman.

Each of these terms used is clearly defined in ordinary dictionaries, Black's Law Dictionary or Words and Phrases, and is subject to understanding and appplication by a jury."

It appeared from the reading of these cases that the Georgia Supreme Court, without actually saying so, was relying on a general-to-specific principle of statutory interpretation, i.e. construing general language (vile, horrible or inhuman) to take on color from more specific accompanying language (torture or aggravated battery to the victim). See *Smith v. Goguen.* That some element from the second or illustrating phrase of Section B7 is necessary to be found along with the general descriptive language is readily apparent just from reading the sentence structure of Section B7. This analysis is highlighted by comparing B7 to, for instance, Section B5 which reads in part as follows: "the murder of a judicial officer . . . during or because of the exercise of his official duty." It is perfectly obvious that a jury finding of a judicial officer being murdered without the further finding that it was related to the exercise of his official duty would clearly be insufficient, standing alone, to support a judgment of a death sentence. This construction of Section B7 is clearly persuasive when one considers that it is the Section most subject to an openended, vague construction and an arbitrary, capricious application.

Therefore, counsel submit that, even if the entire language of Section B7 is facially valid (which counsel dispute), such a partial, incomplete jury finding supporting a death sentence is unconstitutionally broad

where such a partial finding by analogous reasoning, would not even be sufficient to support a civil judgment in a routine matter.

Counsel submit that there is a striking analogy between the civil practice of special jury verdicts, or special interrogatories to the jury and the procedure in the sentencing phase under the Georgia Death Penalty Statute. In a civil case, the special verdict, found by the jury pursuant to a special interrogatory submitted to them, forms the basis upon which the judge renders the judgment required by applying the law to the jury's special finding. In death sentence procedure under the Georgia Statute, the jury's finding of a statutory aggravating circumstance beyond a reasonable doubt (presumably a complete one) forms the basis upon which the judge renders the judgment required by law, i.e., the death sentence.

In civil law, if the jury's special finding is incomplete, partial or vague, no valid judgment could be rendered upon it, or, if rendered, it would be void for uncertainty.

In the old Georgia case of *Burke v. Schwarzweiss,* 153 Georgia 751, 113 S.E. 16, a special verdict finding by the jury in a promissory note dipsute involving two notes, that there was due from the maker of two notes the amount of "note" with interest less credits and from the endorser the amount of "notes" with interest less credits was *held void for uncertainty.* (Emphasis supplied)

> "A verdict says Coke (*Co. Litt* 227, a) finding matter uncertainty and ambiguously is insufficient, and no judgment will be given thereon.
>
> A verdict which finds but part of the issue and says nothing as to the rest is insufficient." *Prentice v. Zane's Administrator,* 49 U.S. 470, 8 How. 470, 12 L.Ed. 1160.

Also, in 1882, the first Justice Harlan held as follows in a case also involving a promissory note:

> "Looking, therefore, as we must, to the case as disclosed by the record, we are constrained to hold that the answers to the special questions propounded by the Court, being silent as to the assignment by the bank, did not furnish a basis for judgment in favor of the Plaintiffs . . . In *Patterson v. The United States,* 2 Wheat. 221, it was said, that if it appeared to the court of original jurisdiction, or to the Appellate Court, that the verdict was confined to a part only of the matter in issue, no judgment could be rendered upon it. In *Bonds v. Williams,* 11 Wheat. 415, the claim of the Plaintiff being founded upon a bequest of certain slaves, was essential to a recovery, at law, that the assent of the executor to the legacy should be proved. This Court, speaking by Mr. Chief Justice Marshall, said: 'although in the opinion of the Court there was sufficient evidence in the special verdict from which the jury might have found the fact, yet they have not found it, and the Court could not, upon a special verdict, intend it. The special verdict was defective in stating the evidence of the fact, instead of the fact itself. It was impossible, therefore, that a judgment could be pronounced for the Plaintiff'." . . .
>
> "It was the province of the jury to pass upon the issues of fact, and the right of the Defendants to have this done was secured by the Constitution of the United States. They might have waived that right, but it could not have been taken away by the Court . . . It has often been said by this Court that the trial by jury is a fundamental guarantee of

the rights and liberties of the people. Consequently, every reasonably presumption should be indulged against its waiver. For these reasons the judgment below must be reversed." *Hodges v. Easton,* 1 S.C. 307, 106 U.S. 408, 27 L.Ed. 169 (1882).

Surely, in matters of life and death, the applicable standards should be no less. In deed, in view of the recognized qualitative difference between death and other criminal penalties, as well as the difference between the applicable burdens of proof in criminal and civil cases, one is compelled to the conclusion that the law "calls for a greater degree of reliability when the death sentence is imposed." *Lockett v. Ohio,* 98 S.C. 2954, 2964 (1978).

Therefore, since the Georgia Supreme Court has upheld a death sentence in this case upon a jury's partial, incomplete finding upon a special verdict that would not support a judgment of civil law, then it follows, reasonably and logically, that, in ignoring such niceties of law, the Georgia Supreme Court has adopted an unconstitutionally overbroad construction of Section B7.

Since the words "vile, horrible and inhuman" contain only the subjective portion of Section B7, and since the Georgia Supreme Court's construction, open-ended, rather than narrowed, allows these subjective terms to stand alone as guidelines to jury discretion in considering between life and death, "it does not fulfill *Furman's* basic requirement by replacing arbitrary and wanton jury discretion with objective standards to guide, regularize, and make rationally reviewable, the process for imposing a sentence of death." Woodson v. North

Carolina, 96 S.C. 2978, at 2990, 2991. This creates a substantial risk that the death penalty will be imposed in Georgia under Section B7 in a wantonly arbitrary and capricious manner with "no meaningful basis for distinguishing the few cases in which it was imposed from the many in which it was not." *Furman v. Georgia,* 92 S.C. 2762, 2764. (Stewart, J., and White, J., concurring) "When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the 8th and 14th Amendments." *Lockett v. Ohio,* 98 S.C. 2954, at 2965 (Burger, C.J., plurality opinion)

Since the Constitution of the United States "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged", *In re Winship,* 397 U.S. 358, 364 (1970), see also *Jackson v. Virginia,* 47 USLW 4883 (June 28, 1979), the same standard of proof is constitutionally required to establish any fact upon which a death sentence is to be based; for the "qualitative difference between death and lesser criminal penalties entails . . . a corresponding need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina,* 428 U.S. 280, 305 (1976) (plurality opinion)

In *Godfrey,* the jury, during the sentencing phase, was instructed by the District Attorney that torture and aggravated battery were not involved in this case. (Tr. 570, 571; Appendix P. 75, 76). Therefore, the jury's sentencing verdict should have found beyond a reasonable doubt that "the offense was outrageously and wantonly vile, horrible and inhuman *in that it involved*

depravity of mind"; i.e., "depravity of mind" should have been found as a matter of fact beyond a reasonable doubt in order that the verdict be complete. Since the jury did not so find (quite suspiciously in view of strong psychiatric testimony in Defendant's favor) and the trial judge imposed the judgment of death upon this insufficient finding of the aggravating circumstance, the affirmance by the Georgia Supreme Court demonstrates that the Court has adopted an overbroad construction of Section B7 in violation of the 8th and 14th Amendments to the United States Constitution.

(C)

I

Counsel submit that the Georgia Supreme Court has applied Section B7 to the petitioner's case in such an overbroad way as to violate the Eighth and Fourteenth Amendments to the United States Constitution.

The Georgia Court has previously indicated, three months after *Gregg v. Georgia* was decided, that it would not adopt this open-ended approach:

> "Under our duty specified in Georgia Code Annotated Section 27-2537(c)(2) we have no intention of permitting this statutory aggravating circumstance to become a 'catch-all' for cases simply because no other statutory aggravating circumstance is raised by the evidence.
>
> This Court has affirmed death sentences involving this statutory aggravating circumstance. The cases were:

(1) *House v. State,* 232 Georgia 140, 205 S.E.2d 217 (1974) cert. den., 44 LW 3762, in which the defendant was found guilty of strangling his seven year old boy to death after committing rape (anal sodomy) upon him.

(2) *McCorquodale v. State,* 233 Georgia 369, 211 S.E.2d 577 (1974), cert. den., 49 L.E.2d 1218, in which the defendant beat, whipped, burned, bit and cut his bound victim, put salt on her wounds, and sexually abused her prior to murdering her by strangulation.

(3) *Banks v. State,* 237 Georgia 325 (1976), in which the defendant killed two non offending defenseless persons in an execution style killing by gunshot. (There was also evidence that the man's wallet and some other personal items were missing from the bodies–supp. by counsel)

> We believe that each of these cases establishes beyond any reasonable doubt a depravity of mind and either involved torture or an aggravated battery to the victim as illustrating the crimes were outrageously or wantonly vile, horrible or inhuman. *Each of these cases is at the core and not the perphery, and we intend to restrict our approval of the death penalty under this statutory aggravating circumstances to those cases that lie at the core.* See Florida's approach to a similar problem in *State v. Dixon,* 283 So.2d 1, 110 (1973), cited with approval by the Supreme Court of the United States in *Proffitt v. Florida,* 96 S.C. 2960, 49 L.E.2d 913 (1976)." (Emphasis supplied)

If a Statute is facially valid, (which counsel here dispute) to determine whether it has been over-broadly applied to an individual, or over-broadly construed in

general, one must, of necessity, examine the stated intent of the law as measured against the factual circumstances within which it is applied.

There can be little doubt that the Georgia Death Penalty Statute, on its face, intended to narrow the range of the applicability of the death penalty within each class of capital crime, e.g. murder. See *GCA Section 26-1101*(a)(b)(c) (1972). For, "it is recognized that individual culpability is not always measured by the category of the crime committed." *Woodson v. North Carolina*, 96 S.C. at 2988 (1976) (Stewart, J., quoting Burger, C.J., dissenting in *Furman v. Georgia*) Thus, the State of Georgia attempts to guide jury discretion in making distinctions through the statutory scheme considered by this Court in detail in *Gregg v. Georgia,* 96 S.C. 2921, N. 9, GCA Section 27-2534.1, requiring the finding of certain aggravating circumstances beyond the guilt of murder, before the imposition of the death penalty is authorized. There are nine such aggravating circumstances setting out particular type murders, felony murders, particular circumstances, and particular individuals, and then there is Section B7, herein involved.

Under the *Furman* reasoning, Section B7 could not become a 'catch-all' to authorize the death penalty in all other types, and sub-types, of murder, regardless of the factual circumstances: that it could be used for this purpose is obvious upon examination of its largely vague language, as this Court recognized in *Gregg v. Georgia,* 96 S.C. at 2938. Otherwise, if one did not presume the statutory intent to be one of limitation, the statutory scheme would cover all types of murder and become a largely mandatory scheme, which has

been disapproved. *Woodson v. North Carolina,* supra.; *Roberts v. Louisiana,* 96 S.C. 3001.

Under the circumstances, one would not expect to see the death penalty being imposed in "domestic murder cases". These type cases have traditionally been accorded almost a separate sub-category murder. They have usually involved strong emotions, mental and emotional disturbance, caused by the stormy nature of the relationship between husband and wife; they usually involve threatened or impending breakup of the marriage and home, strongly opposed by one party; or, the discovered or revealed, paramour situation.

That "domestic murder cases" are a traditionally distinct sub group and are not ordinarily thought susceptible to Section B7 was implicitly recognized by the Georgia Supreme Court in *Dix v. State,* 238 Georgia 209 at 216, 232 S.E.2d 147 (1976), where the defendant tortured and killed his ex-wife, Dixie Jordan, and then kidnapped her mother, sister and niece:

> "Although lesser sentences than death are frequently imposed in *domestic murder cases,* it does not follow that the death penalty would not be authorized for murder of one spouse by another under any circumstances. The Statute does not forbid imposition of the death penalty upon marital murders; it merely requires that statutory aggravating circumstances exist. They exist here. The evidence showed that the victim was deliberately and methodically tortured by being cut and carved as well as strangled before being put to death. The fact that this couple had been married does not prevent imposition of the death penalty. See *Smith v. State,* 236 Georgia 12, 222 S.E.2d 308 (1976)."

Counsel is aware of only two other cases pending in

Georgia where death sentences were upheld which involved husband and wife or ex-husband and wife:

> *Smith v. State,* 236 Georgia 12, 222 S.E.2d 308 (1976), where a man drove to Georgia from Florida with an accomplice and murdered his wife's ex-husband, and his new wife, with a shotgun, so the killer's wife could collect insurance money on her ex-husband for herself and children. Both husband and wife were sentenced to death under GCA Section 27-3534.1(b)(4), that the murder was "committed for the purpose of receiving money or any other thing of monetary value." Section B7 was not found. This case appears also in *Godfrey* in the Appendix listed amongst those cases found "similar", "considering both the crime and the defendant. Code Annotated Section 27-2537(c)(3)." Then there is the case of *Alderman v. State,* 241 Georgia 496, 246 S.E.2d 642 (1978). In this case, Alderman approached a close friend, John A. Brown, and asked him to help him kill his wife, Barbara J. Alderman. The defendant promised Brown that he would split the proceeds of his wife's insurance with him. Alderman pulled a gun on Brown and made him hit Mrs. Alderman in the back of the head with a 12 inch crescent wrench which Alderman had given him. When she ran into the living room they both tackled her and attempted to strangle her and when she passed out, Alderman submerged her in the bathtub and drowned her. He then took her into the next County, put her behind the wheel of her car and ran her car off a bridge so that it would appear that she had a wreck, fell out of the car and drowned on the way to her Aunt's house. The jury convicted Alderman and imposed the death sentence finding both Section B4 and Section B7, finding the entire Section.

It is quite clear that killing for money takes these cases out of the category of domestic murders. Therefore, counsel submit that the petitioner is the only "domestic murderer" under death sentence in Georgia at present.

Furthermore, if one compares cases by considering the factual setting, the background, the *mens rea* and mitigating circumstances, it is clear that the petitioner's case bears no real "similarity" to the fifteen cases listed in the Appendix to the *Godfrey* decision. This is done pursuant to the Statutory Sentence Review Process by which the Georgia Supreme Court compares the death sentence with those similar ones where the death sentence has been upheld "considering both the crime and the defendant". GCA Section 27-2537(c)(3). This Court, in *Gregg v. Georgia,* viewed this mandatory sentence review as a "important additional safeguard against arbitrariness and caprice", 428 U.S. at Page 198; counsel submit that in this case, that safeguard has been insufficient and further evidences that the Georgia Supreme Court has adopted an unconstititionally overbroad construction of Section B7 in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

A brief look at the cases listed in the Appendix to the Godfrey decision will show that they are not "similar" in the commonly use sense of the word:

> *House v. State,* 233 Ga. 140 (1974), where the defendant was found guilty of strangling two seven year old boys to death after committing anal sodomy upon them, found Section B7 only;
>
> *Gregg v. State,* 233 Ga. 117 (1974), where the defendant was picked up hitchhiking by two men

and as they went outside the car off of the interstate to use the bathroom, he shot both of them for the purpose of robbing them, and only Section B2 was found, however, Section B7 was charged;

Floyd v. State, 233 Ga. 280, (1974), where the defendant entered a stranger's home on the pretext of using the telephone and tied the mother and 16 year old daughter up before shooting them twice in the head–Section B(2) on robbery was found and Section B7 was found using the adjective phrase and specifying that it involved torture to the victims;

Chenault v. State, 234 Ga. 216 (1975), where the defendant killed Mrs. Martin Luther King, Sr., and another man during a crowded church service–and only Section B3, creating great risk of death to more than one person, was found;

Smith v. State, 236 Ga. supra; *Burke v. State*, 236 Ga. 850, and companion case Gaddis v. State, 239 Ga. 238 (1977), where the two burglarized the home for the money and robbed an elderly couple at gunpoint before strangling them slowly to find out where the rest of their money was–Section B2, Section B7, and Section B7 were found;

Coleman v. State, 237 Ga. 84, *Isaacs v. State*, 237 Ga. 105, and *Dundee v. State*, 237 Ga. 218 (1976), companion cases where the three entered a home for the purpose of burglary and then as each member of the household arrived, they were killed before taking one of the women and raping her and mutilating her breast before killing her--six members of the family were killed in all and the jury found Section B2 three times for Coleman and Dungee and four times for Isaacs–Section B7 was not found;

Banks v. State, 237 Ga. 325 (1976), where the

defendant killed a couple of strangers in the woods under circumstances held to show torture, there was evidence of robbery although the jury found Section B7 only–Banks had a prior conviction of murder which had been reversed and he had pled to manslaughter;

Young v. State, 239 Ga. 53, where Young had beat, kicked stumped six elderly persons, three of whom died, in order to burglarize and rob them–jury found Section B2 and Section B7;

Peek v. State, 239 Ga. 422 (1977), where the defendant killed two men by beating them to death with a stick, one of them being a witness killing, and also kidnapped and raped a woman during the same transaction–the jury found Section B2 twice but did not find Section B7;

Westbrook v. State, 242 Ga. 151 (1978), and *Finney v. State*, 242 Ga. 582, where the defendants robbed, kidnapped and then took two elderly women out into the woods, tied them up, and beat them to death with 2 x 4 boards–the jury found Section B2 and Section B7 and Westbrook had a record of 11 burglaries, one larceny, two weapon charges, and two escapes.

Counsel are not contending that the petitioner has a constitutional right to a proper sentence review. We only make these comparisons to point out the dramatic over-breadth of the application of Section B7. When one considers the fact situation in *McCorquodale*, or *House*, as compared with that of *Godfrey*, it practically encompasses the entire category of murder in the first degree. In *Harris v. State*, the Georgia Supreme Court declared an intention to stick to the "core and not the periphery" cases. One would think that this case would be of the periphery and not at the core. In *Godfrey*,

there was strong psychiatric testimony favorable to the defendant to the effect that due to a dissociative condition the defendant was unable to control his actions and did not even recollect the crime under "truth serum". Also, the victims were his wife and mother-in-law with whom his wife was living at the time awaiting a divorce action after the following day, and who had vigorously encouraged his wife to finally put an end to the marriage. There was evidence that their marital history had been stormy, highly emotional, at times violent; that his wife had committed him to Milledgeville State Mental Hospital on three previous occasions, to which he acceded as a condition of a reconciliation with her; and that there had been highly emotional arguments between them by telephone shortly before the shootings. The affirmance of the death penalty in this case must be construed to mean that the Georgia Supreme Court considers the "periphery" cases to be manslaughter.

However, if one considers the cases before the Georgia Supreme Court where life sentences were given, one finds a large number of cases similar to Godfrey's. [*Footnote:* At Mr. Rodak's suggestion, counsel are filing with this Brief, a special supplemental addendum not to be printed but lodged in the Clerk's office for reference; a copy of the same will be served on the Attorney General of Georgia also. This special addendum comprises approximately 104 pages of xerox copies of life sentence cards prepared by Dennis A. York, the Administrator provided for by Statute, who helps the Georgia Supreme Court keep track of cases. These life sentence cards are the summations of fact that the Georgia Supreme Court Justices consider

according to Mr. York in his deposition. These materials were obtained pursuant to notice to produce and deposition of Mr. York in the Civil Habeas Corpus proceedings styled *McCorquodale v. Charles Balcolm*, Warden, et. al., Civil Action File Number C-79-95A, pending now in the United States District Court for the Northern District of Georgia, Atlanta Division.] These materials reveal that of the 221 life sentence cases, 45 of them can be fairly designated as "domestic murders". The State had waived or withdrawn the death penalty in all of those domestic murder cases except 14. And in those 14, the jury refused to impose the sentence of death (They are *Johnston v. State*, Page 4 of Special Addendum, *Bond v. State*, Page 14, *Brown v. State*, Page 18, *Proveaux v. State*, Page 19, *Simmons v. State*, Page 19, *Olins v. State*, Page 28, *Edwards v. State*, Page 63, *Flury v. State*, Page 64, *Crower v. State*, Page 65, *Staymate v. State*, Page 85, *Ramey v. State*, Page 87, *Richardson v. State*, Page 88, *Burger v. State*, Page 89, and *Wilcox v. State*, Page 100.) There were several cases very similar to Godfrey's where the death penalty was waived: *Reville v. State*, Page 44, *Smith v. State*, Page 8, *Freeman v. State*, Page 26, *Lindsey v. State*, Page 36, *Reeves v. State*, Page 43, *Mitchell v. State*, Page 90, and *Allanson v. State*, Page 54, which involved multiple murders.

In addition there were several cases very similar to Godfrey where the death penalty was sought and the jury gave life: *Bonds v. State*, Page 14, where the husband shot the wife in the presence of the children; *Flurey v. State*, Page 64, and *Burger v. State*, Page 89, where there were multiple victims and there was a showing that they begged not to be shot.

Concerning *Reville v. State*, 235 Ga. 71, the prosecutor in this case read excerpts from this case in front of the jury during argument on guilt and innocence in order to leave the impression that the Supreme Court of Georgia had already decided a case just like Godfrey's against the defendant. This issue was raised on appeal and appears on Page 39 of the Petition for Certiorari in this case and also appears in the printed Appendix, Page 71. After reading from the facts of the case, the District Attorney ended up concluding as follows:

> "The exact case, exactly like this except for the fact that there was only one person, the man's wife, dead and he could remember nothing about the shooting or denied any memory of the shooting." (TR. 506, 507, App. P. 71)

It is only fitting justice now, that the State should be held accountable for those words and required to point some other basis for explaining why *Reville* received a life sentence, whereas, Godfrey received the death sentence, where the cases were exactly alike, in the State's words, other than that this most clearly demonstrates the arbitrariness and capriciousness, and thus unconstitutionality, of the Georgia Supreme Court's construction of Section B7.

II

Since the statutory aggravating circumstance B7 has such obvious proclivity to overbroad construction and application by juries, thus arbitrary and capricious, in violation of the 8th and 14th amendments; and since

the statute does not set out concrete mitigating circumstances as in Florida, see *Proffitt v. Florida*, 428 US 242, (see also Ali, Model Penal Code Section 210.6, 1962 upon which both laws were obviously based), one would reasonably expect the Georgia Supreme Court to insist upon narrowing jury charges that would properly channel, focus, and guide jury discretion.

The statute can be read and construed to require that this be done:

> "(b) . . . or he shall include in his instructions to the jury for it to consider, (any mitigating circumstances or aggravating circumstances otherwise authorized by law) and (any of the following statutory aggravating circumstances) which may be supported by the evidence . . ." (see GCA Section 27-2534.1)

These concrete examples of mitigating circumstances could be pointed out in addition to the general definition of mitigation now given in the standard trial jury charge at the sentencing. (See Appendix Page 79) The Georgia Supreme Court has missed several opportunities to require that instructions specify what mitigating factors, in contemplation of law, are raised by the evidence; or even to let the jury know, authoritatively in charge, what the law usually contemplates as "mitigation". This is not a common lay term. It will not suffice for the Court to simply rely on the defendant, or defense counsel, to point out to the jury whenever there may be any evidence which could be consideered in mitigation. The point is that the law, either on its face or as construed and applied by the Courts, is required to focus, and guide by objective standards, jurors' discretion in the matter of life and

death. "Legislatures [and Courts] may not so abdicate their responsibility for setting the standards of the criminal law." *Smith vs. Goguen*, 94 Supreme Court at 1248 (1974).

Those fimiliar with trial dynamics know the force and authority that the Court's charge has for a jury. The typical jury has been told from the beginning of the trial that what the lawyers say is not to be considered as evidence and that they are to take their *law* in charge from the Court, and not from anything the lawyers might say. In this capitol sentencing context, the position taken by the Georgia Supreme Court delegates to the defense counsel the task the law directs to the Judge; that is, to point out what evidence in the record is, in contemplation of law, a mitigating circumstance. See GCA Section 27-2534.1 (b). Under the circumstances typically, the defense attorney tells a jury at the sentencing stage that an (a), or (b) or (c) factor, present in the case, is a recognized mitigating circumstance; then the District Attorney tells the jury what aggravating circumstance they may consider. Then the Court, in charge, reenforces the District Attorney, while giving no apparent, concrete support to the defense attorney's position. The disadvantage to the defense is clear. One can imagine what effect this has in a jury room:

> Juror A–"Well, it just seems like to me that the Judge, he is a'going along more with the DA than with that other feller."
>
> Juror B–"Yeah . . . an you know that feller is a'gittin paid to try to git his client off. He's talking about how the *law* says we's s'posed to look at his client's clean record and how bad upset he was . . . ain't they been tellin us all

> along here to look to the Judge for the law?–Well, he didn't say nuthin 'bout that business."

Counsel certainly intends no disrespect to jurors and believes, with Jefferson, that the people are by far the best and safest ultimate repository of power. However, "it is quite simply a hallmark of our legal system that juries be carefully and adequately guided in their deliberation." *Gregg vs. Georgia*, 96 Supreme Court at 2934 (1976) However, in this case the trial Judge's sentencing charge just gave the language of Section B7 without definition or elaboration and merely told the jurors that they could consider any mitigating circumstances they found, giving an abstract definition only of what mitigation is. (See Appendix, Page 79)

When sophisticated legislative committees and judges, who favor the vigorous use of the death penalty, begin to speak in glowing and confident terms about the ability of the average juror to fully understand and apply such legal concepts with only the slighest sort of guidance and instruction in so an important matter, one gets a bit suspicious. Most assuredly, juries are not turned loose on an important tort case upon such meager fair. One gets the feeling that what is wanted is as little guidance and rational restraint as possible on the community's instinct for retribution; rather, they want it unleashed–frequently. "The instinct for retribution is part of the nature of man, in channeling that instinct in the administration of criminal justice serves as important purpose in promoting the stability of a society governed by law." *Gregg vs. Georgia*, 96 Supreme Court at 2930 (1976) The prosecution in *Godfrey* sought the advantage of this instinct for

retribution in trying the case at the first opportunity, even though defense counsel had filed motions to continue to allow community outrage and indignation time to cool. The trial judge overruled this motion and the Georgia Supreme Court upheld the discretion when all knew the purpose of the prosecution's tactic and the fundamental unfairness of it.

When one views these things together, the vagueness of Section B7, the absence of mitigating circumstances in the statute itself, and the Georgia Court's omission on reasonable sentencing charges, one begins to sense a grudging, cynical compliance with the command of the Constitution, as construed in *Furman vs Georgia.* The wording of Section B7 and the absence of concrete examples of mitigation in the statute suggest it; the Georgia Supreme Court's construction and application of it in this case confirms it.

In response to the numerous objections, in various cases, to the lack of such simple, concrete, wholly untroublesome instructions, citizens on trial for their lives have been answered thusly:

> "The trial court instructed the jury to consider the facts and circumstances in mitigation and aggravation, explaining to them that mitigating circumstances are those which do not excuse the offense, but which in fairness and mercy may reduce the degree of moral culpability or blame. He further instructed them that they were free to recommend mercy even if they found aggravating circumstances to exist. These instructions allow the jury to examine the defendant's individual characteristics in deciding his fate. The jury was properly instructed as to what it was to consider in reaching its decision as to sentence. *Fleming v. State,* 240 Georgia 142, 240 SE 2d 37 (1977); *Hawes v. State,* 240 Georgia 327, 240 SE 2d 833 (1978); *Spivey v. State,* 241 Georgia 477, 241 SE 2d 236 (1978) cert. denied 99 Supreme Court 642 . . .
>
> As for the fact that the trial court failed to give examples of mitigating circumstances, it is not required that specific mitigating circumstances be singled out by the Court in giving its instructions to the jury. *Potts v. State,* 241 Georgia 67, 86, 243 SE 2d 510 (1978), *Spivey v. State,* Supra. *To influence the jury by use of examples might limit their discretion to consider other matters in addition to the examples given.* Defense counsel, in argument to the jury, can point out all the mitigating circumstances available and a non-specific charge allows the jury to consider anything it deems worthy. We find no error in these enumerations." *Gates v. The State,* Georgia Supreme Court Number 35053 decided October 24, 1979.

This argument, that concrete examples of mitigating circumstances might limit the juror's discretion in a way unfavorable to defendants, sounds vaguely familiar. We have heard this type argument in this Country before; this empty solicitude for phantom limitations on citizens' rights. This was the discredited argument Hamilton and other anglophiles, made against having a concrete, enumerated Bill of Rights: their argument was similar, since everyone knows, they said, and understands what the rights of free men are, it might limit them to list them in a Bill of Rights to the U.S. Constitution (see Federalist Papers, no. 84) It is inconceivable that the blessings of Liberty could have been so well preserved and protected without a written Bill of Rights. Likewise, in this context, it is as hard to believe that specifying concrete examples of mitigating circumstances in charge would hurt or limit a defendant

as it is to believe that we would be addressing the question before this Court in the absence of an 8th Amendment.

So, along with the absence of mitigating circumstances in the statute itself, and the presence of vague language, vaguely construed, this glaring omission of the Georgia Supreme Court to take the opportunity to narrow, guide and channel jury discretion, where it is clearly foreseeable that overbroad and thus capricious and arbitrary application may result, further evidences that the Georgia Supreme Court has adopted an unconstitutionally broad construction of Section B7 in violation of the 8th and 14th Amendments to the U.S. Constitution.

Counsel submit in conclusion, that this endeavor, to continue punishment of death, unrestrained and uncircumscribed by reasonable objective guidelines, under the guide of "boilerplate" guidelines, is ultimately an attempt to subvert the Rule of Law. It is an attempt, if you will, to get at the "Devil" thus sacrificing and circumventing the primacy of the Rule of Law. This point has rarely been made with such eloquence and simplicity as in the oft-quoted dialogue between Sir Thomas More and his incautious young associate in Robert Bolt's play "A Man For All Seasons" 66 (1962):

> Roper: "So now you'd give the Devil benefit of law!
>
> More: Yes. What would you do? Cut a great road through the law to get after the Devil?
>
> Roper: I'd cut down every law in England to do that!
>
> More: Oh? . . . And when the last law was down,

> and the Devil turned round on you—where would you hide, Roper, the laws all being flat? This country's planted thick with laws from coast to coast—man's laws not Gods—and if you cut them down—and you are just the man to do it—d'you really think you could stand upright in the wind that would blow then? . . . Yes, I'd give the Devil benefit of law, for my own safety's sake."

CONCLUSION

The judgment of the Georgia Supreme Court affirming the petitioner's sentence to death should be vacated and reduced to a life sentence.

Respectfully submitted,

J. CALLOWAY HOLMES, JR.
Stewart and Holmes
P.O. Box 63
Cedartown, Georgia 30125

GERRY E. HOLMES
Mundy and Gammage
P.O. Box 930
Cedartown, Georgia 30125

ADDENDUM "A"

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after you have unanimously agreed upon it and have completed it, have your foreman to then date it and sign it and return it into Court. Please retire to the jury room, ladies and gentlemen.

(WHEREUPON, THE JURY RETIRED
(FROM THE COURTROOM AT 4:17
(P'M')

THE COURT: Ask the jury to come in.

(WHEREUPON, THE JURY RETURNED
(TO THE COURTROOM AT 5:00 P.M.

THE COURT: Mr. Foreman, ladies and gentlemen, do you have a question?

THE FOREMAN: Yes, sir, we have a question. We would like a definition of the following phrase: Depravity of mind to the victim.

THE COURT: All right, sir. I anticipated that was going to be your question. That's why I've got these dictionaries here. And I can only give you the definition of what a depraved mind is in the dictionary.

One legal dictionary here, Black's Law Dictionary, says a depraved mind is an inherent deficiency of moral sense and rectitude, equivalent to statutory phrase, "depravity of heart" defined as highest grade of malice.

And the definition of deprave is to defame; vilify; exhibit contempt for.

Now, this is a bigger dictionary and let me see if I

can give you the definition of that. And that is as far as I can go gentlemen. The legislature created that law and they did not place a definition in the Code on it.

This dictionary says the definition of depraved is to make bad the judgement rather than making it more discriminating, to pervert the meaning of something, to make corrupt, to bring about the moral debasement, to reduce in value.

That's what the legal dictionary says that depraved and depravity is. And so, my interpretation–and I hope it is correct–that his actions were so vile, horrible or inhuman that he created such a state of mind in the victim as defined by the world depravity.

That is the very best I can do for you, ladies and gentlemen. I wish I could do better.

THE FOREMAN: In that case, we shouldn't be very long in reaching a verdict.

THE COURT: All right, sir.

(WHEREUPON, THE JURY RETIRED

(FROM THE COURTROOM.

MR. CAIN: Your Honor, now that the jury has

SUPPLEMENTAL REPORT

February 24, 1978, interview with Clarence Reeves. Clarence, will you state your full name for me please? Clarence William Reeves. What is your address? 734 Pace Street. Okay, you understand that we are tape-recording this statement. Right. And that is with your permission, right. Earlier I advised you of your rights, do you understand them? Yes sir. Okay, and there are no threats or promises made to you to get you to give us this statement, is that right? That's right. Present is Preston Worthington and John Dean and we are at the Cedartown Police Department.

Clarence, if you don't mind, and if you would, just tell us, in your own words exactly what happened yesterday. Well, it dates back to around, long about, somewhere long about December, when it all really started I expect. I had to send my wife to that mental institution up here in Rome. She come out and before that night there though we had our house to burn. I redone all the house, fixed it all back, bought her new furniture and everything throughout. Then after she got out of the Rome Regional Hospital, she just up and told me after I got all the furniture in there to pack my clothes and go that she really didn't need me anymore. So I packed them and I left. And then I got with my oldest son yesterday after we went up to divorce court. They told me what I had to do. I had to give her my house. $70.00 a week, which was all right with me at the time and that I told them I would go ahead along with anything like that. So I turned around then and I got with my son and carried him with me.

What's his name, Clarence? Kenneth William Reeves.

And I carried him with me over to Marato Mfg. Co. to check on a fence that they were putting up for me so I could give them a bill. Over there I left the bill and I come back by Rockmart at Billy Ballew's and I got me a six pack of beer. I drank about 3 of those and my son, I started to take him to his mama so I could give her the $70.00 to get groceries with. So he told me he knew exactly where she was at, at this mans house. I didn't even know she was going with this man or nothing at all until yesterday. This is the First idea you've had about it? First idea is when my boy told me. What time was that Clarence yesterday? That was sometime around 5:00 or 5:30 around there is when he told me about it. So we rode on across the mountain there and I drank 3 of the beers and come into town. So he showed me where she was at and I walked up to the door, and they were in there all hugged up and under the circumstances that they had just come out of court and everything it was just more than I could take.

And where was this Clarence? That was on Clyde Drive. Here in Cedartown? In Cedartown, at the man's house. I had never seen this man before in my life. Walked in; How did you get in the house? Well when they seen me, she broke and run and he opened the door, I reckon he was gonna try to come out by me. And then I stepped in the house and I shot her one time and I shot him twice. Or I shot at him twice, I don't know whether I hit him both times or not.

What did you shoot them with? .38 Detective Special. That's the gun you took us over to Haralson County to the church that we got this morning. Yes, same one.

What did you do when you shot both of them? Well,

I just got in the car, I was so tore up. I didn't know what to do. I backed out and I rode back up across the mountains up there and I went up to the church, got out, took the shells out, (3 empties and 3 live ones) and I threw them down across the woods, and I went out there to that tombstone and hid the gun. I left my car parked in the road so that the kids didn't see me where I had put the gun.

Who was in the car with you? My boy, Kenneth William Reeves, and Betty Ballew. And they were with you when you went to the house? Yes, but they didn't see anything cause I was inside the house when the shooting took place and they were sitting in my car, and they didn't know that I even went down there for that purpose. And I didn't have no intention for going there to kill neither one of them. I had went to take her the $70.00 to get her groceries with. In other words this is something that just; it just on the spur of the moment just come up. When you got there it just upset you so much? It just upset me so much till it was just more than I could take. Cause the idea of them being in that way and me a having to foot the bill and giving the house and everything and she was gonna marry this guy just as quick as our divorce went through. And I worked hard all my life to get what I had, to try to get ahead, and it was just more than I could take, at the time of it. Well, after you went down there and hid the gun behind that tombstone, what did ya'll do then? I drove right on back to the Quick Serve up here and that is where they picked me up at. Do you know what time it was they picked you up? No sir, I don't cause I didn't look at my watch. Ya'll didn't go anywhere else after you left the cemetery, just came back to town?

No sir, just came straight into town. I did drink the 2 or 3 more beers coming back in, I was so upset I really don't know which one, but it wasn't the six pack bought to start off with.

Well, did you tell Betty and your son what happened? I told them I had shot their mama. I told my boy that. What did he say about it Clarence? It just upset him a little bit at the time being cause I really didn't have time to talk to him much after that. He didn't have anything to say. Yea. Cause I didn't know whether at that time I had hit her hard enough to kill her or not.

Is there anything else that you can think of that you need to tell us or want to tell us? No sir, not that I know of. Where had you been staying Clarence since you left home? I've been staying with Lynn Pollard and his wife out at the Bentley's Trailer Park. We stayed at Miller's Trailer Park until they condemned them, part of them, and we had to move from there. So I've been staying out there with those people and working with Benefield out of town. In other words you have been staying with them ever since you and your wife have been separated? Right, all but the first 2 weeks I slept in the truck until it got too cold that I had to go somewhere or another to get out of it. Yea. Well, she put me out without anywhere or any place to stay at the time. I had to find some place to get in out of the cold. That's just all there was to it. Okay.

Okay, everything you have told us this morning has been free and voluntary on your part. Is that right? Yes sir, that's right. In other words you have cooperated with us the best that you knew how fully. Yes sir, sure did. And what you have told us is the truth?

Right, just exactly like it happened.

Clarence was there any conversation between you and your wife or else the other man that was in the house there, was there any conversation at all? No Sir. None at all? None at all. He broke to run out the door and I run, I went in the house. Where were they sitting when you went in? They were standing in the middle of the floor hugged up. Did you look through the window or door or what? Looked through the window. What was in that room, do you remember? I didn't see nothing, but just them, that was all I seen at the time. Then after that I just went blind with rage, I reckon. The only thing I knew was that she run backward toward the bedroom or something, there is a room back that way. And he broke to go out the door. And that pistol does that belong to you? Yes sir. Where did you buy it at? I bought it at Billy Croker's. How long have you had it? Oh I bought it somewhere around December. Okay Clarence if there is nothing else, we'll just conclude the interview. Alright.

This has been an interview with Clarence Reeves here at the Cedartown Police Department.